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Attorneys for Plaintiffs Operating Engineers'  
Health And Welfare Trust Fund, et al.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OPERATING ENGINEERS' HEALTH AND  
WELFARE TRUST FUND FOR NORTHERN  
CALIFORNIA;

PENSION TRUST FUND FOR OPERATING  
ENGINEERS;

PENSIONED OPERATING ENGINEERS'  
HEALTH AND WELFARE TRUST FUND;

OPERATING ENGINEERS AND PARTICIPATING  
EMPLOYERS PRE-APPRENTICE, APPRENTICE  
AND JOURNEYMEN AFFIRMATIVE ACTION  
TRAINING FUND;

RUSSELL E. BURNS and RICHARD PIOMBO,  
Trustees;

OPERATING ENGINEERS LOCAL 3 OF THE  
INTERNATIONAL UNION OF OPERATING  
ENGINEERS, AFL-CIO,

Plaintiffs,

v.

BADGER DAYLIGHTING CORP. *dba* NEVADA  
BADGER DAYLIGHTING CORP., a Nevada  
corporation,

Defendant.

Case No.

**COMPLAINT**

Parties

1. The Operating Engineers' Health and Welfare Trust Fund for Northern California (which includes the Addiction Recovery Program, Inc.); Pension Trust Fund for Operating Engineers (which includes the Pension Plan for the Pension Trust Fund for Operating Engineers, and the Operating Engineers Annuity Plan); Pensioned Operating Engineers' Health and Welfare Trust Fund; and Operating Engineers and Participating Employers Pre-apprentice, Apprentice and Journeymen Affirmative Action Training Fund (collectively referred to hereinafter as the "Trust Funds"), are employee benefit plans as defined in the Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3). The Trust Funds and their fiduciaries are together referred to herein as "ERISA Plaintiffs" or "Plaintiffs." Russell E. Burns and Richard Piombo are Co-Chairmen of the Joint Boards of Trustees of ERISA Plaintiffs with authority to act on behalf of all Trustees.

2. Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO ("Union") is a labor organization as defined in § 2(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(5), and is represented by counsel herein for the limited purpose of collecting union dues owing as part of the subject contribution claims of Plaintiffs, and not for any other cause of action. The Union expressly reserves its rights to pursue any other cause of action on its own behalf.

4. Badger Daylighting, Inc. *dba* Nevada Badger Daylighting Corp., a Nevada corporation, ("Defendant") is an employer by virtue of ERISA § 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29 U.S.C. § 152(2).

Jurisdiction

5. Jurisdiction exists in this Court over the claims asserted by ERISA Plaintiffs by virtue of ERISA § 502, 29 U.S.C. § 1132, in that Plaintiffs seek to enforce the provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief under ERISA.

6. Jurisdiction exists in this Court over all the claims by virtue of LMRA § 301, 29 U.S.C. § 185, in that Plaintiffs seek to enforce the terms and conditions of a valid Bargaining Agreement.

7. To the extent jurisdiction over any claim does not exist under ERISA or the LMRA,

1 supplemental jurisdiction exists in this Court over such claims by virtue of 29 U.S.C. § 1367 in that they  
2 arise out of a common nucleus of operative facts that form the basis of the federal claims asserted  
3 herein, each of which has a substantial ground in federal jurisdiction.

#### 4 Venue

5 8. Venue is conferred upon this Court by ERISA § 502, 29 U.S.C. § 1132. Where an action  
6 is brought under ERISA § 502 in a district court of the United States, it may be brought at Plaintiffs'  
7 discretion, in the district where the plan is administered, where the breach took place, or where a  
8 defendant resides or may be found, and process may be served in any other district where a defendant  
9 resides or may be found. ERISA Plaintiffs' Trust Funds are administered in this district at their principal  
10 place of business in Alameda, California. Thus, jurisdiction and venue are properly grounded with this  
11 Court.

12 9. Venue exists in this Court with respect to the claims under LMRA § 301(a), 29 U.S.C. §  
13 185, as this Court has jurisdiction over the parties, as the Local Union maintains its principal place of  
14 business in this district, its duly authorized officers or agents are engaged in representing employee  
15 members in this district, and the claims arise in this district.

#### 16 Intradistrict Assignment

17 10. The basis for assignment of this action to this Court's Oakland Division is that all of the  
18 events and omissions giving rise to Plaintiffs' claims occurred in the County of Alameda, where ERISA  
19 Plaintiffs' Funds and the Bargained Plans are administered, and where Defendant therefore failed to  
20 fulfill its statutory and contractual obligations to Plaintiffs.

#### 21 Factual Allegations

22 11. Defendant entered into the National Pipeline Agreement ("National Agreement")  
23 between the International Union of Operating Engineers ("International Union") and the Pipe Line  
24 Contractors Association. Defendant also entered into the Badger Daylighting Hydro/Vacuum  
25 Agreement for Northern California ("Hydro/Vacuum Agreement") with the Union. The Hydro/Vacuum  
26 Agreement incorporates the terms of the Master Agreement ("Master Agreement") for Northern  
27 California between the Union and United Contractors, Associated General Contractors of California,  
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1 Inc., Industrial Contractors, UMIC, Inc., and Northern Alliance of Engineering Contractors. The  
2 National Agreement, Hydro/Vacuum Agreement, and Master Agreement are collectively referred to  
3 hereinafter as the “Bargaining Agreements”.

4 12. The Bargaining Agreements incorporate the terms of the trust agreements (“Trust  
5 Agreements”) establishing Plaintiffs’ Trust Funds.

6 13. The Bargaining Agreements and Trust Agreements require Defendant to provide  
7 employer contributions to Plaintiffs’ Trust Funds, and to the other plans more fully described in the  
8 Bargaining Agreements. ERISA Plaintiffs are third-party beneficiaries of the Bargaining Agreements.

9 12. In addition to Plaintiffs’ Trust Funds, Defendant is required under the Bargaining  
10 Agreements to pay certain contributions to: Operating Engineers’ Vacation and Holiday Pay Plan;  
11 Contract Administration Fund; Job Placement Center and Market Area Committee Administration  
12 Market Preservation Fund; Industry Stabilization Fund; and Business Development Trust Fund  
13 (collectively referred to hereinafter as the “Bargained Plans”). Plaintiffs’ Boards of Trustees have been  
14 authorized to collect and distribute monies due to the Bargained Plans under the Bargaining Agreements  
15 and Trust Agreements.

16 14. Under the Bargaining Agreements, Defendant is required to regularly pay to ERISA  
17 Plaintiffs, the Bargained Plans, and the Union, certain sums of money, the amounts of which are  
18 determined by the hours worked by Defendant’s employees. Contributions are due on the fifteenth  
19 (15th) day of the month following the month in which hours were worked, and are considered  
20 delinquent if not received by the twenty-fifth (25th) day of that month. Defendant is also required,  
21 pursuant to the Bargaining and Trust Agreements, to pay liquidated damages in the amount of ten  
22 percent (10%) for each delinquent contribution, but in the amount of twenty percent (20%) for each  
23 delinquent contribution which is the subject of litigation. Moreover, the Bargaining Agreements provide  
24 that interest accrues on delinquent contributions at the rates reasonably set by the Trustees from the date  
25 they become delinquent, which is the twenty-sixth (26th) day of the month in which payment was due,  
26 until paid in full.

27 15. The Bargaining Agreements further require Defendant to maintain time records or time  
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1 cards, and to permit an authorized Trust Fund representative to examine such records of Defendant as is  
2 necessary to determine whether Defendant has made full payment of all sums owed to ERISA Plaintiffs.  
3 Should an audit of Defendant's records reveal Defendant has failed to provide full and prompt payment  
4 of all sums due to Plaintiffs, Defendant must reimburse Plaintiffs for the amounts due, including audit  
5 fees, in addition to any other obligations under the Bargaining Agreements.

6 16. Defendant has failed and refused to pay amounts found due to Plaintiffs as a result of an  
7 audit of Defendant's payroll records for the period from March 5, 2010 through September 31, 2012.  
8 Liquidated damages and interest have been incurred and are owed to Plaintiffs for the unpaid  
9 contributions for that period.

10 17. Plaintiffs are also entitled to recover any and all other contributions, and all liquidated  
11 damages and interest on delinquent contributions, not specified above, found due on timecards, further  
12 audit, or otherwise, including estimated contributions for any months Defendant fails to report to  
13 Plaintiffs, through the time of Judgment. Plaintiffs are in the process of conducting an audit of  
14 Defendant's records for the period from January 1, 2013, through the date of the inspection to determine  
15 whether there are any additional amounts due from Defendant.

16 **FIRST CAUSE OF ACTION**  
17 **For Payment of Delinquent Contributions, Interest, Liquidated Damages,**  
18 **Attorneys' Fees and Costs Against Defendant**

19 18. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 17, above.

20 19. Defendant has a contractual duty to timely pay the required contributions to Plaintiffs and  
21 the Bargained Plans, and to timely pay dues to the Union, pursuant to the Bargaining Agreements.  
22 Defendant also has a contractual duty under the Bargaining Agreements to permit an audit of its records  
23 to determine whether it is making full and prompt payment of all sums required to be paid by it to  
24 Plaintiffs, and to pay Plaintiffs all amounts found due as a result of an audit, including audit fees.

25 20. In addition, Defendant has a statutory duty to timely make the required payments to  
26 Plaintiffs under ERISA § 515, 29 U.S.C. § 1145, and LMRA § 301(a).

27 21. By failing to make the required payments to Plaintiffs, Defendant breached the  
28 Bargaining Agreements and Trust Agreements and is in violation of ERISA § 515, 29 U.S.C. § 1145,

1 and LMRA § 301(a).

2 22. Defendant's failure and refusal to pay the required contributions was at all times, and still  
3 is, willful. Defendant continues to breach the Bargaining Agreements, and incorporated Trust  
4 Agreements, by failing to pay all amounts owed as alleged. Said refusal is unjustified and done with  
5 knowledge and intent.

6 23. ERISA Plaintiffs are without an adequate remedy at law and will suffer continuing and  
7 irreparable injury, loss and damage unless Defendant is ordered specifically to perform all obligations  
8 required on Defendant's part to be performed under ERISA, 29 U.S.C. §§ 1101-1381, the LMRA, 29  
9 U.S.C. §§ 141-197, and the Bargaining and Trust Agreements, and is restrained from continuing to  
10 refuse to perform as required thereunder.

11 24. This Court is authorized to issue injunctive relief based on the traditional standard. As set  
12 forth above, ERISA Plaintiffs have a strong likelihood of success on the merits. There is the possibility  
13 that Plaintiffs' Trust Funds and their participants will suffer irreparable injuries. The balance of  
14 hardships and advancement of public interest favor ERISA Plaintiffs.

15 25. This Complaint does not in any manner relate to statutory withdrawal liability that may or  
16 may not be assessed against Defendant. ERISA Plaintiffs expressly reserve the right to pursue any such  
17 withdrawal liability claims against Defendant as provided by ERISA Plaintiffs' Plan Documents, Trust  
18 Agreements, and the law.

19 Prayer

20 WHEREFORE, Plaintiffs pray as follows:

21 1. For a judgment against Defendant as follows:

22 (a) Any unpaid contributions, due at time of Judgment, including those specified  
23 above as well as any other contributions determined as due by further audit, timecards, or otherwise,  
24 including estimated contributions for any months Defendant fails to report to Plaintiffs, pursuant to  
25 ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A);

26 i. To ERISA Plaintiffs and the Bargained Plans, in accordance with ERISA  
27 § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A) and the Bargaining and Trust Agreements;  
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ii. To the Union in accordance with the Bargaining Agreements.

(b) Liquidated damages on all late-paid and unpaid contributions in an amount provided for under the Bargaining and Trust Agreements, and with respect to ERISA Plaintiffs, ERISA § 502(g)(2)(c), 29 U.S.C. § 1132(g)(2)(c).

(c) Interest on all late-paid and unpaid contributions at the rates set in accordance with the Bargaining Agreements, the Trust Agreements, and ERISA § 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B).

2. Plaintiffs' reasonable attorneys' fees and costs of this action, including any audit fees, in accordance with ERISA § 502(g)(2)(D) and (E), 29 U.S.C. § 1132(g)(2)(D) and (E); and in accordance with the Bargaining Agreements for all Bargained Plans; and with LMRA § 301, 29 U.S.C. § 185, for all Plaintiffs.

3. For an order,

(a) requiring that Defendant complies with its obligations to Plaintiffs under the terms of the Bargaining Agreements and Trust Agreements;

(b) enjoining Defendant from violating the terms of those documents and of ERISA;

and

(c) enjoining Defendant from disposing of any assets until said terms have been complied with, and from continuation or operation of Defendant's business until said terms have been complied with.

4. That the Court retain jurisdiction of this case pending compliance with its orders.

5. For such other and further relief as the Court may deem just and proper.

DATED: February 27, 2017

SALTZMAN & JOHNSON LAW CORPORATION

By: /s/ Erica J. Russell  
Erica J. Russell  
Attorneys for Plaintiffs Operating Engineers' Health  
And Welfare Trust Fund, et al.